

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ANA L. ZUMBA**

Claimant

VS.

**U.S.D. 500**

Self-Insured Respondent

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Docket No. 1,052,235

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the December 2, 2010, Amended Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts. Conn Felix Sanchez, of Kansas City, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant failed to meet her burden of proving she sustained an injury to her bilateral shoulders or low back in a fall at work. Accordingly, the ALJ denied claimant the requested preliminary benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 2, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues that she met her burden of proving she sustained an injury to her bilateral shoulders and low back in a fall that occurred on April 29, 2010, that arose out of and in the course of her employment with respondent.

Respondent contends that neither claimant's low back nor her bilateral shoulder complaints are related to her employment or were the result of her fall of April 29, 2010.

The issue for the Board's review is: Did claimant suffer injuries to her bilateral shoulders and/or low back in a fall that occurred on April 29, 2010, that arose out of and in the course of her employment with respondent?

**FINDINGS OF FACT**

Claimant testified that on April 29, 2010, she fell on some stairs while at work at Rosedale Middle School. She said she fell backwards down the last three steps of the stairway. Her husband was called, and he took her to Concentra Medical Center (Concentra), where she was seen by Dr. Temesgen Wakwaya. Concentra's records indicate that claimant complained of hurting her "back, right knee, left ankle and elbow."<sup>1</sup> X-rays were taken, and she was found to have a fractured left ankle. Claimant was referred to Dr. J. Clinton Walker, whom she saw on the date of her accident. Dr. Walker's report indicates that claimant denied back pain, as well as other musculoskeletal problems. Dr. Walker concurred with claimant's diagnosis of a fractured left ankle and performed surgery to repair the fracture on April 30, 2010. None of Dr. Walker's records indicate that claimant complained to him about back pain or shoulder pain, although claimant testified she told Dr. Walker about her back pain and was told she would need to see her primary care physician in regard to the back condition.

Claimant admits that she had surgery on her upper back in May 2007. She testified also that on February 26, 2010, she was involved in an incident at school when she was pushed from behind by a student while she was in the process of sitting down. She denied having any work restrictions or medical treatment from that incident. She denied having any pain in her low back before her fall down the stairs on April 29, 2010.

On October 12, 2010, claimant was seen by Dr. Pedro Murati at the request of claimant's attorney. Dr. Murati took a history from claimant, wherein she said she fell while walking down stairs, landing on her back and shoulders. Along with her complaints about her left ankle, claimant told Dr. Murati that she has upper and lower back pain, as well as shoulder pain. Claimant also told Dr. Murati about the incident in February 2010 when she was pushed from the back. She indicated to Dr. Murati that she had pain in her back, shoulder and neck since that incident.

After examining claimant, Dr. Murati diagnosed her with myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, right rotator cuff sprain, and post open reduction and internal fixation of bimalleolar ankle fracture. Dr. Murati opined that claimant's diagnoses are, within a reasonable medical probability, a direct result of her work-related injury of April 29, 2010.

**PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

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<sup>1</sup> P.H. Trans., Resp. Ex. A at 45.

claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>2</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>3</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>4</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>5</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>6</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>7</sup>

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<sup>2</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>3</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>4</sup> *Id.* at 278.

<sup>5</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>6</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>7</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>9</sup>

### ANALYSIS

There is no dispute that claimant suffered a work-related accident on April 29, 2010, and there is no dispute that claimant injured her left ankle in that accident. Respondent denies, however, that claimant injured her back or either of her shoulders in that fall.

Following her accident, claimant received medical treatment from Dr. Wakwaya and Dr. Walker. Claimant testified she informed the treating physicians of her back and shoulder pain. This is not a situation, however, where it is alleged the physician failed to note a complaint. Instead, Dr. Walker specifically noted in his record of the April 29, 2010, examination of claimant that she denied suffering from any back or shoulder pain. The first mention of back or shoulder pain in any medical record currently in evidence is the October 12, 2010, report of Dr. Murati.<sup>10</sup>

Generally, the Board gives some deference to the credibility determinations by an ALJ who had the opportunity to personally observe the witness' testimony. Here, the ALJ apparently did not find the claimant credible because she denied claimant's request for medical treatment. Although the claimant's accident, a fall down stairs, seems to be one which could cause the type of injuries claimant alleges and, in fact, did cause a fractured ankle, this Board Member agrees with the ALJ that claimant's denial of any injury to her back or shoulders to her treating physicians is inconsistent with her current claim. This evidence, likewise, contradicts Dr. Murati's causation opinion, which was given months later. Claimant is not alleging a gradual onset of back and shoulder pain. Instead, she is alleging those symptoms occurred immediately as a result of her fall. This contention is simply not supported by the contemporaneous medical records.

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<sup>8</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>9</sup> K.S.A. 2010 Supp. 44-555c(k).

<sup>10</sup> Claimant alleged injuries to her back and shoulders in her E-1, Application for Hearing, filed August 27, 2010.

**CONCLUSION**

Claimant has failed to prove that she injured her back or shoulders in the April 29, 2010, accident at work.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Amended Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated December 4, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2011.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Self-Insured Respondent  
Marcia L. Yates Roberts, Administrative Law Judge